Pep Boys–Manny, Moe and Jack *and* International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner. Case 10–RC–15342

June 30, 2003

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held December 11, 2002,[1] and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 4 against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record in light of the exceptions[2] and brief and has decided to adopt the hearing officer's findings and recommendation only to the extent consistent with this Decision and Direction.

The Employer has excepted to the hearing officer's recommendation that the challenge to the ballot of Aaron Dishman be sustained. For the reasons set forth below, we find merit in this exception.

Dishman transferred from a nonunit position to a unit installer position effective November 3, during the payroll eligibility period.[3] The hearing officer credited the testimony of the Employer's service manager, Donald Warfield, that during the eligibility period Warfield spent 45 minutes to an hour on each of 3 days (November 6, 8, and 9) training Dishman, and that during this time Dishman performed some unit work such as balancing, mounting, and dismounting customers' tires. Nevertheless, the hearing officer found that Dishman was not "working" in the unit and thus was ineligible to vote, characterizing Dishman's bargaining unit work during the eligibility period as "orientation and preliminaries" in preparation for the installer job which began "in earnest" the following week.

We disagree with the hearing officer. It is well settled that in order to be eligible to vote an individual must be "employed and working" in the bargaining unit on the established eligibility date, unless absent for certain specified reasons. *Dyncorp/Dynair Services*, 320 NLRB 120 (1995). The Board defines "working" as the actual performance of bargaining unit work. Id.

In *Dyncorp/Dynair*, an employee in the process of transferring from a nonunit position to a unit position performed some unit work while participating in 2 days of on-the-job training during the eligibility period. The Board found the employee eligible to vote, relying on the employee's actual performance of unit work during the eligibility period. The Board distinguished cases in which challenged voters' training consisted of mere "orientation and preliminaries" and they performed no unit work.[4] The Board stated, "An employee's performance of unit work is an objective fact that can be easily ascertained. Thus, we will not speculate whether an employee performing unit work is or is not receiving 'training.'" Id. at 121. In sum, the employee's performance of unit work during the eligibility period, as distinguished from "orientation and preliminaries," led to the Board's finding that the employee was "working" in the unit.

Here, the credited evidence establishes that during the eligibility period Dishman performed actual unit work in his on-the-job training. Thus, as in *Dyncorp/Dynair*, supra, we find that Dishman was not engaged in mere "orientation and preliminaries," but was "employed and working" in the unit during the eligibility period. Accordingly, we find that Dishman was eligible to vote, and we shall direct that his ballot be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 10 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Aaron Dishman, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

[1] All dates hereafter are in 2002 unless otherwise noted.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] The payroll eligibility period ended on November 9.

The bargaining unit is as follows:

> All regular full-time and part-time master technicians, technicians, mechanics, installers, service advisors, and senior service advisors employed by the Employer at its facility located at 5845 Brainerd Road in Chattanooga, Tennessee, but excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

[4] *F. & M. Importing Co.*, 237 NLRB 628, 632–633 (1978); *Emro Marketing Co.*, 269 NLRB 926 fn. 1 (1984), summary judgment granted 272 NLRB 282 (1985), enfd. 768 F.2d 151 (7th Cir. 1985).